REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 40 OF 2016

MOHAMMED KOSHI KOTO alias

MOHAMED KESHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 164 of 2016 by Hon. Njeri Thuku – SRM at Lamu)

CORAM: Hon. Justice R. Nyakundi

Mr. Mohammed for the appellant

Ms. Mwaniki for the state

JUDGEMENT

Background

The appellant was charged with several offences.

In Count I; Attempted arson contrary to Section 333 (a) of the Penal Code. The particulars of the offence were that the Appellant on the 20th day of February, 2016 in Kadhahar area, Langoni Location in Lamu West Sub-County within Lamu County, jointly with others not before court willfully and unlawfully attempted to set fire on a dwelling house, the property of Joyce Muthoni Muthike.

Count II; he was charged with an offence of malicious damage to property contrary to Section 339 (1) of the Penal Code. The particulars of the offence were that the Appellant while with others not before court, willfully and unlawfully damaged three house-doors, two bags and several clothes all valued at Kshs.72,700/= which property belong to Joyce Muthoni Muthike. This is alleged to have transpired on the 20th day of February, 2016 at Kandahar area, Langoni Location of Lamu West County within Lamu County.

In Count III he was charged with an offence of housebreaking contrary to Section 304 (1) and stealing contrary to Section 279 (b) of the Penal Code. That on the 20th day of February, 2016, at Kandahar area, Langoni location of Lamu West Sub-County within Lamu County, jointly with others not before court, broke and entered the dwelling house of Joyce Muthoni Muthike with intent to steal therein and did steal from therein cash money and two black Sanyo radios all valued at Kshs.24,200/=, the property of Joyce Muthoni Muthike.

In Count IV he was charged with an offence of housebreaking contrary to Section 304 (1) and stealing contrary to Section 279 (b) of the Penal Code. The prosecution alleged that the appellant on the 20th of February 2016 within Lamu County while with others not before court, jointly broke and entered the dwelling house of Serah Wangare Ngige and stole cash money, two beds, two mattresses, three bags of cement, one oven, 200 building stones, painting chalk, clothes and assorted households all valued at Kshs.110,000/= the property of Serah Wangare Ngige.

The appellant pleaded not guilty on all four counts and he was released on reasonable bail terms. However, during the early stage of the trial, his bond was cancelled which meant he conducted his trial while in remand custody. A full trial was held in which the Appellant found not guilty of the offences outlined above.

However, the Learned trial Magistrate found the accused guilty of taking part in a riot contrary to Section 81 of the Penal Code; and threatening to kill. Most importantly, it is important to note that these offences under Section 179 of the Criminal Code were not part of the

charges filed against the appellant. In his reasoning the Learned Magistrate relied upon the witness' testimony of the complainant to suffice so sufficiently to prove the elements of the offence. He was therefore sentenced to one year and five months imprisonment which were to run concurrently.

Having been aggrieved and dissatisfied with both conviction and sentence of one year and five months imprisonment he preferred and appeal on the following grounds. That the prosecution did not avail key witnesses and that he is the sole breadwinner in his family.

He filed submissions in support of the instant appeal on the **06th November 2018.** It is contended therein that the learned trial Magistrate convicted and sentenced him on the basis of mere hearsay and allegations from the complainant. Further that the prosecution failed to prove its case beyond reasonable doubt and that his defence rebutted the allegations lodged against him. He indicated that the witnesses who were called in support of his case proved that he was not at the scene on the material day when the criminal activities were being committed.

The appellant further submits that the prosecution did not show that he indeed engaged in a riot nor in threatening to kill the complainant. He argues that the allegations regarding death threats and engaging in a riot were not proved beyond reasonable doubt by the prosecution as no adequate evidence was produced to that effect.

The respondent opposed the appeal by way of submissions on 6th of March 2019. The prosecution counsel for the state **Mr. Stephen Kasyoka** argued that the appellant's ground that he was convicted on the basis of hearsay evidence ought to be rejected by this court. It was Learned counsel contention that the prosecution complied with Section 63 (1) of the Evidence Act Cap 80 Laws of Kenya which provides interalia that oral evidence might in all cases be considered as direct evidence. He therefore submitted that at the trial, the prosecution in keeping up with the foregoing provisions called witnesses who were at the scene who alluded to the events and facts in issue with regard to the commission of the offence. That therefore, proved to the required standard the offence against the appellant. For this proposition he cited the case of **Miller v Minister of Pensions (1947) ALL ER 332.**

Analysis

As this is a first appeal, I'm under a duty to examine the evidence on record a fresh, exhaustively and to form my own independent decision in **Okeno v Republic (1972) EA 32, 36.**

Having looked at the evidence on record, the submissions both in support and opposition of the appeal, the grounds of appeal and the Judgment of the Learned trial Magistrate. What seems to be the main issue for determination is whether the appellant was properly convicted and sentenced in terms of the law. What caught the attention of this court are findings made by Learned trial Magistrate. It appears that the appellant was acquitted of all the counts contained in the contained in the charge sheet but in an interesting twist the trial court went further to make the following findings at page 8 of the Judgment:

"For the offences under Section 179 of the Criminal Procedure Code which this court finds that were not part of the charges brought but which through the witnesses' testimony, the court finds the accused guilty of: taking part in a riot contrary to Section 81 of the Penal Code; Threatening to kill contrary to Section 223 of the Penal Code."

Two questions arise, firstly, whether the two offence which the appellant was found guilty of are cognate offences to any of the offences contained in the charge sheet or the offences that the appellant was charged with. Secondly, whether the findings of the Learned trial Magistrate meets the threshold on the right to a fair trial under Article 50 of the Constitution of Kenya 2010. The Article stresses basic to fairness in a criminal process which an accused person is entitled without any compromise. The specific rights include: the presumption of innocence in criminal proceedings, right to be informed of the charge before the trial within a reasonable time, right to legal representation, the right to be supplied with all witness statements and any material to be relied upon by the prosecution in respect of the criminal offence, adequate facilities for one to prepare his defence against the charge. Further, the right to be equal before the law entails to have equal opportunities to cross-examine and challenge evidence adduced by the prosecution. It is not lost for this court to emphasis the fundamental doctrine that the guilt of an accused person must be proven by the prosecution beyond reasonable doubt without any iota of assistance from the defence. It is therefore impermissible for the trial court to frame a charge, proceed to make findings in accordance with the law which was not a subject of the trial. In the eyes of the law every man is honest and innocent unless is proved legally by the state. The maxim of equality of arms was therefore violated by the Learned Magistrate in the course of the criminal proceedings which eventually occasioned a failure of justice. The findings by the Learned trial Magistrate are not curable under Section 382 of the Criminal Procedure Code.

In elucidating the provisions of Section 179 of the Criminal Procedure Code, the trial Magistrate failed in error of fact and applied wrong principles with regard to creating a cognate offence not relevant to the main charge against the appellant. The power of the court to convict an accused person for an offence which he was not initially charged with but in which evidence adduced establishes a lesser offence is well settled in Law. The said Section stipulates as follows:

> ***"(1). When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charge with it.***
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> ***(2). When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

As regards the first hint, I place reliance on the cases of **Ali Mohammed Hassan Mpanda vs R (1963) E.A. 294 and Mugambi vs Republic (1976 – 80) 1 KLR 585** where it was held that for the Sub-Section 179 (2) to apply, two conditions must be present; namely, that the substituted conviction is for an offence which is both minor and cognate to the offence charged.

In the same vein, the Court of Appeal stated as follows in **Robert Mutungi Mumbi v R. Criminal Appeal No. 5 of 2013:**

> ***"An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both offences are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence off which he is to be convicted."***

The offences of attempting to commit arson is a felony which attracts fourteen years imprisonment, and housebreaking attracts a term of seven years imprisonment. These two offences are not cognate offences of either the offence of taking part in a riot or threatening to kill. In fact, the offence of threatening to kill is a more serious offence than housebreaking in terms of penalty. Therefore, the ingredients set out in Section 179 as well as the case laws mentioned above have not been satisfied in the instant appeal.

The second situation contemplates for the courts to convict an accused person without a charge is when the prosecution could not prove all the facts alleged but could prove only a few facts which constitutes a minor offence.

As outlined above, my findings are: though the Criminal Procedure Code allows for alternate offence the specific charge must be cognate to the main offence and there should be no variance as to its validity of a conviction within the findings in regard to failure of justice.

The landmark decision of the **House of Lords** in **Ridge v. Baldwin [1964] AC 40** clarified the law, that the rules of natural justice, in particular right to fair hearing, (***audi alteram partem rule***) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

> ***a) the right to be heard by an unbiased tribunal.***
>
> ***b) the right to have notice of charges of misconduct***
>
> ***c) the right to be heard in answer to those charges.***

In **MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206, at page 210**, this Court stated as follows:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

In the instant matter, the Appellant was not charged with the offences of taking part in riot and threatening to kill. That means he was accorded a chance of being informed of the substance of these charges and neither were they given an opportunity to respond to those charges. It is the finding of this court the Appellant's rights under Article of the Constitution were violated. Clearly, the Appellant was condemned unheard which is a violation of the right to be heard guaranteed under the Constitution as well as enunciated in **Ridge v Baldwin Case**. Furthermore, he was not given the chance to cross-examine witness on these charges. It therefore goes without saying that their right to fair trial was violated.

Without doubt whatsoever, according parties to a dispute the right to adduce and challenge evidence relied upon by the opposing party is intrinsic as it gives both parties a chance to fully ventilate the dispute and also in realising equality of arms. Parties must be at equal arms. Denying one party the chance to produce the only evidence that supports its case for the sole reason that the parties said they were ready at the beginning of the trial as in this case is undoubtedly prejudicial and the same amounts to procedural impropriety.

Fair hearing lies not in the correctness or propriety of the decision but rather in the procedure followed in the trial and determination of the case. It is only when the opponent has been heard that the Judge would be seen to be discharging the duty of an unbiased umpire. The violation of the rule of ***audi alteram partem perse*** lies in the breach of the fundamental human right. Once the right is violated, it is irrelevant whether the decision made subsequent thereto is correct.

In the circumstances, it is this Court's considered view that the Appellant was convicted and sentenced on charges which he was not given a chance to respond to and thus, undoubtedly a violation of the right to fair trial. His right to be presumed innocent until proven guilty was also infringed. In the premises, the Appeal herein is meritorious.

Accordingly, the judgment of the trial court is hereby interfered with by setting it aside on both conviction and sentence. The Appellant is hereby set at liberty unless lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF MARCH 2019.

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R. NYAKUNDI

JUDGE